IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5841 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgment? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

UMANG NITINBHAI SHAH (DETENU)

Versus

STATE OF GUJARAT

Appearance:

MR AR SHAIKH for the Petitioner.

Mr.A.D. Oza, GOVERNMENT PLEADER,

for the Respondents.

CORAM : HON'BLE MR.JUSTICE P.B.MAJMUDAR

Date of decision: 16/08/2004

ORAL JUDGEMENT

By filing this petition, the petitioner-detenu has challenged his detention order dated 20.2.2004, by which he is detained as a 'dangerous person' under the Gujarat Prevention of Anti-social Activities Act, 1985

("PASA", for short). Along with the detention order, the petitioner-detenu was also served with the grounds of detention.

In the grounds of detention, there is a reference about five pending criminal cases. All these cases are in connection with committing theft of various types of vehicles, such as motor cycles, Maruti car, etc. After considering those cases and after considering the statements of witnesses, whose names have not been disclosed to the petitioner, the petitioner is detained as a "dangerous person" under PASA.

The learned Advocate for the petitioner submitted that so far as the statement under Section 9(2) of PAS is concerned, the petitioner has not been given names of those witnesses. He submitted that the Authority has not tried to find out the antecedents of the detenu. He submitted that the order of the detaining authority and the grounds of detention do not indicate the basis of arriving at the subjective satisfaction. A mere statement about having verified the veracity, genuineness and correctness of the fear expressed by the witnesses, under such circumstances, can be of no virtue, in absence of contemporaneous material. The learned Advocate for the petitioner, therefore, submitted that the order of detention stands vitiated for want of proper exercise of powers under Section 9(2) of PASA and resultant infringement of a constitutional right of the detenu of making an effective representation due to non-disclosure of names of the witnesses. The order of detention, according to the learned Advocate for the petitioner, therefore, deserves to be quashed and set aside by allowing this petition.

To substantiate the above contention, the learned Advocate for the petitioner has relied upon the decision of this Court in Kishor Naginbhai Parmar v. State of Gujarat & Ors., 2000 (4) GLR 3236, wherein this Court (Coram : A.L. Dave, J.) held as under :-

" ... ...

14. In this view of the matter, the order of the detaining authority and the grounds of detention do not indicate the basis of arriving at the subjective satisfaction. A mere statement about having verified the veracity, genuineness and correctness of the fear expressed by the witnesses, under such circumstances,

can be of no virtue, in absence of contemporaneous material. The detention therefore stands vitiated for want of proper exercise of powers under Sec.9(2) of the PASA Act and resultant infringement of a constitutional right of the detenu of making an effective representation due to non-disclosure of names of the witnesses. The order of detention, therefore, deserves to be quashed and set aside by allowing this petition.

... ...'

It is further submitted that so far as the pending criminal cases are concerned, all these cases are in connection with thefts and they are individual in nature. It is submitted by the learned Advocate for the petitioner that so far as the aforesaid cases are concerned, at the most it can be said that they affect individuals and not the society at large. He further submitted that applying the principle laid down by the Supreme Court in Harpreet Kaur vs. State of Maharashtra, AIR 1992 SC 979, to the facts and circumstances of this case, it is difficult to say that the detaining authority was justified in arriving at the satisfaction that the activities of the petitioner detenu were likely to adversely affect maintenance of 'public order'. All these activities, may, at the most create some law and order problem. In view of this, he submitted that the satisfaction arrived at by the detaining authority cannot be said to be germane and stands vitiated and, therefore, the petition is required to be allowed.

In order to substantiate the above submission, the learned Advocate for the petitioner has placed reliance upon a Division Bench decision of this Court rendered in Special Criminal Application No.1681 of 1992, wherein the Division Bench of this Court held as under in paragraphs 5 and 6 :-

" ... ...

5. Learned counsel for the petitioner submits that the activities alleged against the petitioner would affect only maintenance of law and order and not public order. In her submission the detaining authority has lost sight

of the distinction between the concept of 'law and order' and that of 'public order'. In this connection reference may be made to a decision of the Supreme Court in the case of Harpreet Kaur vs. State of Maharashtra, reported in AIR 1992 SC 979. After referring to its earlier decisions, in para 14 of the judgment the Supreme Court has observed as follows :

"From the law laid by this Court, as noticed above, it follows that it is the degree and extent of the reach of the objectionable activity upon the society which is vital for considering the question whether a man has committed only a breach of 'law and order' or has acted in a manner likely to cause disturbance to 'public order'. It is the potentiality of the act to disturb the even tempo of life of the community which makes it prejudicial to the maintenance of 'public order'. Whenever an order of detention is questioned, the courts apply these tests to find out whether the objectionable activities upon which the order of detention is grounded fall under the classification of being prejudicial to 'public order' or belong to the category of being prejudicial only to 'law and order'. An order of detention under the Act would be valid if the activities of a detenu affect 'public order' but would not be so where the same affect only the maintenance of 'law and order'. Facts of each case have, therefore, to be carefully scrutinised to test the validity of an order of detention."

Again in para 17 of the judgment the Supreme Court has observed that in each case the courts have to see the length, magnitude and intensity of the questionable activities of a person to find out whether the activities are prejudicial to maintenance of 'public order' or only 'law and order'.

6. Having regard to the aforesaid binding law laid down by the Supreme Court, in the instant case, the court is required to scrutinise as to whether the activities alleged against the

petitioner-detenu would affect maintenance of 'law and order' or maintenance of 'public order'. Be it noted that out of 19 cases registered against the petitioner, none of the criminal cases has been tried so far. All the cases are pending before court. In 14 cases, the allegation is of theft of gas cylinders. In one case the allegation is of theft of V.C.R. and in two cases the allegation is of theft of colour T.V. In one case it is alleged that a motor cycle is stolen and in another case silver ornaments and wrist watch are alleged to have been involved in the offence of theft and other allied offences. By the very nature of the offences it would be difficult to say that these offences would affect the even tempo of public life. In 14 offences gas cylinders have been stolen. Of course this activity as alleged is repetitive in nature. But it is difficult to say that the extent and reach of the offence is such that it would create problem of maintenance of 'public order'. Similar is the position with regard to other five cases. As far as the statements of four witnesses are concerned, they refer to two separate incidents one is alleged to have taken place on June, 1992 at about 9.00 p.m. It has happened on account of non-payment of price of eatables taken from a hotel. Another incident is alleged to have taken place on June 3, 1992 which is alleged to have taken place at about 3.00 p.m. on June 3, 1992, and the cause of the same is also non-payment of price of pan. Both these incidents at the most affect individuals and not the society at large. Applying the aforesaid principle laid down by the Supreme Court to the facts and circumstances of this case it is difficult to say that the detaining authority was justified in arriving at the satisfaction that the activities of the petitioner detenu were likely to adversely affect maintenance of 'public order'. All these activities either taken singly or cumulatively may at the most create some law and order problem. In this view of the matter the satisfaction arrived at by the detaining authority cannot be said to be germane and stands vitiated. Therefore, the petition is required to be allowed.

... ..."

Considering the fact that the Authority has not made necessary exercise before withholding the names of the witnesses under Section 9(2) of PASA, the subjective satisfaction on this point can be said to have been vitiated. Considering the above judgment of the Division Bench of this Court, it cannot be said that the petitioner has violated public order, as, at the most, it can be said that there is a breach of law and order. So far as the criminal cases are concerned, in view of the aforesaid judgment of the Division Bench, it cannot be said that the alleged activities of the petitioner-detenu are likely to adversely affect maintenance of 'public order'.

The petition is accordingly allowed. The order of detention is quashed and set aside. It is ordered that the detenu be released forthwith unless the detenu is required in connection with any other case. The Rule is made absolute accordingly.

Before parting with this judgment, it is required to be noted that the petitioner-detenu is found to be indulging in acts of theft; yet, unfortunately, bail orders are granted by the Magistrates in a routine manner. In a given case, it is the duty of the concerned Public Prosecutor in charge of the matter to point out to the concerned Magistrate the point that the accused is committing such type of cases repeatedly. In such type of cases, wherein offence is repeated by the accused, granting of bail orders mechanically is tantamount to mockery of the courts and judicial system. Merely by putting a rubber stamp, in all these cases, the Magistrate has released the petitioner on bail. It is hoped that, in future, when such serious types of cases are coming up for consideration before the concerned Magistrate, it is for the Magistrate to find out whether the applicant for bail before the court is repeating similar type of offences. Such cases cannot be treated as routine bail applications.

It is also for the concerned Public Prosecutor to highlight such point when Magistrates are required to deal with bail applications of a person who has been found to be indulging in repeated acts of theft, robbery, etc.

At this stage, the learned Advocate for the petitioner submitted that the wife of the petitioner is serving in Ahmedabad and, therefore, the petitioner will not go to Baroda City at least in the near future and the

learned Counsel submitted that upto 20th February, 2005, the detenu is not going to enter Baroda City except for cooperating with the Police Authority in connection with the aforesaid criminal cases. This voluntary statement is recorded so that the petitioner may not be allowed to enter Baroda City and commit same type of offences. It is for the authority to monitor the same.

16th August, 2004 (P.B. Majmudar, J.)

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(apj)